APPENDIX A

A. Pertinent provisions of the Shipping Act, 1916, as amended, 46 U.S.C. § 801 et seq. read as follows:

§ 14. No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

* * *

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

§ 16. It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . . .

§ 22. Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not

satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

§ 29. In case of violation of any order of the Federal Maritime Board, other than an order for the payment of money, the Board, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.

§ 30. In case of violation of any order of the Federal Maritime Board for the payment of money the person to whom such award was made may file in the district court for the district in which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United States having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the Board in the premises.

In the district court the findings and order of the Federal Maritime Board shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

All parties in whose favor the Federal Maritime Board has made an award of reparation by a single order may be joined as plaintiffs, and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

No petition or suit for the enforcement of an order for the payment of money shall be maintained unless filed within one year from the date of the order.

§ 31. The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the Federal Maritime Board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

B. Pertinent provisions of the Administrative Orders Review Act of 1950, 5 U.S.C. § 1031 et seq. read as follows:

§ 1031. As used in this chapter—

(a) "Court of appeals" means a court of appeals of the United States.

(b) "Clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed.

(c) "Petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed.

(d) When the order sought to be reviewed was entered by . . . the United States Maritime Commission, or the Federal Maritime Board, or the Maritime Administration, "agency" means that Commission or Board, or Administration, as the case may require; . . . .

§ 1032. The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, . . . (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 830 of Title 46, and . . . .

Such jurisdiction shall be invoked by the filing of a petition as provided in section 1034 of this title.

§ 1039. (a) Upon the filing and service of a petition to review, the court of appeals shall have jurisdiction of the proceeding. The court of appeals in which the record on review is filed, on such filing, shall have jurisdiction to vacate stay orders or interlocutory injunctions theretofore granted by any court, and shall have exclusive jurisdiction to make and enter, upon the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency. . . .

§ 1040. An order granting or denying an interlocutory injunction under section 1039(b) of this title shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in section 1254(1) of Title 28: *Provided,* That application therefor be duly made within forty-five days after the entry of such order. The final judgment of the court of appeals in a proceeding to review under this chapter shall be subject to review by the

Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of section 1254(1) of Title 28: *Provided further,* That application therefor be duly made within ninety days after the entry of such judgment. Either the United States or the agency or an aggrieved party may file such petition for a writ of certiorari. The provisions of section 1254(3) of Title 28, regarding certification, and of section 2101(e) of Title 28, regarding stays, shall also apply to proceedings under this chapter.

C. Section 16(2) of the Interstate Commerce Act, 49 U.S.C. § 16(2), provides:

§ 16(2). If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,230

FLOTA MERCANTE GRANCOLOMBIANA, S.A., PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS,

PHILIP R. CONSOLO, INTERVENOR.

No. 18,235

PHILIP R. CONSOLO, PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS,

FLOTA MERCANTE GRANCOLOMBIANA, S.A., INTERVENOR.

On Petitions for Review of an Order of the
Federal Maritime Commission

Decided December 17, 1964

Mr. J. Alton Boyer, with whom *Mr. Odell Kominers* was on the brief, for petitioner in No. 18,230 and intervenor in No. 18,235.

Mr. Robert N. Kharasch, with whom *Mr. William J. Lippman* and *Mrs. Amy Scupi* were on the brief, for petitioner in No. 18,235 and intervenor in No. 18,230.

Mr. David P. Simerman, Attorney, Federal Maritime Commission, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of court, with whom *Assistant Attorney General William H. Orrick, Jr.,* and *Messrs. James L. Pimper,* General Counsel, *Robert E. Mitchell,* Deputy General Counsel, Federal Maritime Commission, and *Irwin A. Seibel,* Attorney, Department of Justice, were on the brief, for respondents.

Before BAZELON, Chief Judge, WILBUR K. MILLER, Senior Circuit Judge, and WASHINGTON, Circuit Judge.

WASHINGTON, *Circuit Judge:* This litigation is before us a second time. The background of the case is set forth in our first opinion, at 112 U.S. App. D.C. 302, 302 F.2d 887 (1962). In that opinion we concluded (1) that the Federal Maritime Board properly had before it the issue whether Flota had violated Section 14, Fourth, and Section 16, First, of the Shipping Act, 46 U.S.C. § 812 and 46 U.S.C. § 815, as well as the question whether Flota was a common carrier; (2) that the Board could properly find, as it did, that (a) Flota was a common carrier, (b) its contract with Panama Ecuador and its refusal to grant space to Consolo were unreasonable and unjust, and (c) it was therefore in violation of the Shipping Act; (3) that we have jurisdiction to review reparation orders to the extent necessary to determine their validity; (4) that the Board was within its discretion in (a) denying prejudgment interest to Consolo, (b) refusing to begin the reparation period before Consolo had requested from Flota a fair and equitable portion of space, and (c) selecting 18.46% as the percentage allotment of Flota's banana-carrying capacity and thus the percentage of shipper's total computed net profit to which Consolo was entitled; (5) that there was sufficient evidence to support a finding of competition between Consolo and Panama Ecuador. We did, however, hold that "the Board failed to give adequate consideration" to the question whether "the cumulative weight of all the circumstances . . . rendered

it inequitable to require reparations." Our remand to the Federal Maritime Commission instructed it to consider this last question. *Supra,* 112 U.S. App. D.C. at 311; 302 F.2d at 896.[1]

In remanding we indicated our view that Flota had marshalled substantial evidence in support of its contention that the imposition of reparations would be inequitable. We indicated our view that the law was unsettled during the period for which reparations were assessed and said that the Board's conclusion that the law was settled by the *Grace Line* cases was a "doubtful assumption." We pointed out that the evidence of factual differences between Flota's situation and that of the Grace Line "might well lead to the conclusion that Flota in good faith believed that the *Grace Line* case was distinguishable." We also suggested that the time period of the Flota-Panama Ecuador contract might have seemed to be a reasonable one in light of the *Grace Line* decisions. We noted that Flota had reason to fear liability to Panama Ecuador had it complied with Consolo's demands for space in the absence of a declaratory order by the Board. Finally, we stated that "Flota . . . complained, with some justification, of the two-year delay of the Board in rendering a declaratory order," and that "The result here is that the Board is making Flota pay reparations for the period of the Board's delay." *Supra* at 311, 302 F.2d at 896.

These observations and expressions of opinion on our part were intended to serve as authoritative guidelines for the further deliberations of the Commission, to which we remanded the case for further proceedings not inconsistent with our opinion. We had hoped that further analysis or

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[1] The Federal Maritime Board had by then been succeeded by the Federal Maritime Commission. See our earlier opinion: 112 U.S. App. D.C. at 304, n. 1, 302 F. 2d at 889, n. 1.

The Commission's decision here under review is F.M.C. Docket No. 827 (Sub. 1), issued September 18, 1963.

findings by the Commission would throw light on our initial impressions. We were prepared to affirm the Commission if it could establish that the circumstances were such as not to make it unfair to assess damages against Flota.

The Commission's opinion, presently under review, suggested that Flota had not acted in good faith and concluded that substantial equities in its favor were lacking. A careful examination of that opinion, the evidence relied on by the Commission and the other evidence in the case constrains us to hold that the Commission's determination ignores not only the guideposts of our original decision but also the substantial weight of the evidence before it.

Notwithstanding our conclusion to the contrary, the Commission asserted that the law was not unsettled when Flota executed the contract with Panama Ecuador in May of 1957. Instead of considering whether Flota could in good faith believe that the structural differences in its ships would make a difference to the Board, the Commission asserted: "To rely upon their structural differences as an excuse to avoid common carrier obligations would go far toward eliminating such obligations." The Commission dismissed Flota's filing a petition for declaratory order as a self-serving act made to preserve appearances long after its wrongdoing. The Commission rejected our suggestion that Flota is being made to pay for the Board's own delay. It also rejected our suggestion that Flota might have believed in good faith that its three-year contract with Panama Ecuador would be acceptable to the Board, in view of the 1957 *Grace Line* opinion authorizing a two-year contract. The Commission said "we find it impossible to understand how Flota could have held any such belief."

The reparation provision of the Shipping Act, 46 U.S.C. § 821, is not the ordinary mode for the Commission's regulation of the shipping industry. The grant of reparations is discretionary. This agency, like the Interstate Commerce Commission, has a large range of enforcement pow-

ers to regulate its area of the economy.[2] If a party has good faith doubts about the applicability of a prior administrative adjudication to it, the party need not be its own judge. It can seek information from the agency about the applicability of the ruling to it. In our prior decision, we noted that "a primary purpose envisaged for it [a declaratory order by the agency] under the Administrative Procedure Act—[is] to assist a party in governing its conduct without rendering itself liable to suit. See Administrative Procedure Act § 5(d), 5 U.S.C.A. § 1004(d)." *Supra* at 311, n. 15, 302 F.2d at 896 n. 15. If the course of action a party follows while the administrative determination is pending injures another and enriches itself, reparations to the injured party are frequently allowed. But if the course of action taken does not unduly enrich the party, and the asserted injury to another is only the loss of speculative profits, a real question arises whether reparations should be granted for the period of agency deliberation. Courts and agencies should be sensitive to the considerations of equity which may make reparations an inappropriate remedy in such cases.

We think that an objective and rational examination of all the evidence reveals such equitable factors in this case. It seems clear that Flota entertained serious doubts as to its legal obligations when Panama Ecuador exercised its renewal option in May 1957 and when Flota rejected Consolo's demand for space in August 1957. Flota's petition to the Board for a declaratory order in October 1957 is strong evidence of its good faith. The Commission found that Flota could not have acted in good faith, since its legal

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[2] The reparations and other enforcement sections of the Shipping Act are closely modeled on the Interstate Commerce Act. S. Rep. No. 689, 64th Cong., 1st Sess. 13 (1916). Professors Jaffe and Nathanson note the decreased importance of reparations as an enforcement device in the Interstate Commerce Commission and the declining volume of reparations cases in that agency. JAFFE AND NATHANSON, ADMINISTRATIVE LAW 150-51, 389 (2d ed. 1961).

obligations were clear under existing law. We do not agree. We consider Flota's conduct completely consistent with its asserted good faith belief that prior Board decisions did not compel it to break its contract with Panama Ecuador.

The reasonableness of Flota's behavior in 1957 must of course be viewed in the context of the legal situation which it was then confronting. The question facing Flota in May 1957 was not whether to undertake a new contractual obligation with Panama Ecuador, as the Commission implies, but whether to comply with its previously acquired contractual obligation to Panama Ecuador which had perfected its option for a three-year renewal under its 1955 contract with Flota. In 1955, at the time of the original contract, the only relevant Board statement was the 1953 *Grace Line* report. The report found Grace to be a common carrier of bananas and its exclusive contractual undertaking to be an unlawful discrimination, in violation of its statutory duty to apportion its facilities ratably among shippers; but the Board issued no order pursuant to its report. It discontinued the proceedings against Grace, even though Grace did not cancel its future booking contracts. Furthermore, the Board tacitly approved a two-year advance booking contract between Grace and the complainant Consolo despite the fact that the Board's report stated that six months was the "limit of reasonableness" for advance booking. 4 F.M.C. at 304. In short, the Board discontinued its proceeding in the face of an arrangement at odds with the principles laid down in its report. The lack of precedential value of the 1953 *Grace Line* report is suggested by the Board's failure to cite it in its 1957 *Grace Line* decision, which dealt with substantially the same problem, except on a minor point as to the necessity of a tender. Under these circumstances, this report could hardly have been considered an "authoritative pronouncement," in 1955 or in May 1957, when the contract renewal option was exercised.

In deciding whether or not it was obliged to terminate its contract with Panama Ecuador in May 1957, Flota also had before it the Board's report of April 29, 1957, in the *Grace Line* matter, for such guidance as it provided.[3] This report, holding that Grace was a common carrier of bananas rested primarily on the unprecedented theory that since bananas were "susceptible to common carriage," they could be carried by a common carrier only under terms of common carriage. Grace had rejected the demands of the two complainant shippers for space; the Board concluded that "the record discloses no convincing [nondiscriminatory] reason why any of these parties were denied space." 5 F.M.B. at 284. But the Board held that "in view of the economic problems presented here," a two-year forward-booking system, excluding qualified applicants during the two-year period, was reasonable. It said that Grace must cancel its contracts with existing shippers and offer reefer space under two-year forward-booking arrangements to all qualified shippers. Although an appealable Board decision is valid until reversed, it would be an exaggeration to say that this decision settled the law in the area and provided a reliable foundation on which private parties could confidently plan their actions. The Board's "susceptibility" theory was without precedent; the result was inconsistent with long-standing industry practice; and Grace promptly appealed the decision to the Second Circuit Court of Appeals.[4]

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[3] 5 F.M.B. 278. This report, issued April 29, 1957, was followed by an order issued August 19, 1957, see 5 F.M.B. 286. In May 1957 there was, of course, the possibility that the Board would not issue an order pursuant to its report, as in the first (1953) *Grace Line* matter.

[4] The decision was reversed by the Second Circuit and remanded. 263 F. 2d 709. The Board subsequently found Grace to be a common carrier under a different theory, 5 F.M.B. 615 (1959), and the Second Circuit affirmed the decision over a strong dissent, Grace Line, Inc. v. Federal Maritime Board, 280 F. 2d 790 (1960).

We are satisfied that Flota, faced with a threatened lawsuit by Panama Ecuador, acted on the basis of reasonable doubts whether its contract with Panama Ecuador was prohibited by the Shipping Act.[5] Flota's counsel had good grounds to believe that the second *Grace Line* report, even if valid and binding, did not cover Flota's situation and did not require abrogation of the Panama Ecuador contract.

First, Flota might reasonably have believed that its situation was factually distinguishable from Grace's—that physical differences between Flota's ships and Grace's saved Flota's exclusive contract from being held an unreasonable discrimination. The Shipping Act prohibits "unfair or unjustly discriminatory" contracts (46 U.S.C. § 812, Fourth) and the grant of "undue or unreasonable preference or advantage to any particular person" (46 U.S.C. § 815, First). The standard of violation has built into it the concepts of fairness and reasonableness; discrimination and preferences are not per se prohibited. Hence, an agreement that might be unreasonably discriminatory if entered into by one shipping company might be entirely proper, given a different factual setting, for another company. In stressing that the factual issues were crucial to the Board's decision in *Grace Line*, public counsel in his brief in the Flota case noted that the 1957 *Grace Line* decision

> "held that the carrier's duties to banana shippers would depend upon the factual circumstances attend-

[5] Flota's contract with Panama Ecuador contained the following clause:

> "If any provision or term hereof be invalid or unenforceable for any reason, Grancolombiana [Flota] shall have the right to terminate this contract by giving seven (7) days' written notice of termination to lessee . . . ."

Of course, this provision did not relieve Flota of liability to Panama Ecuador if Flota guessed wrong and terminated a contract ultimately found to be valid, and Panama Ecuador had threatened legal action if Flota leased any of its space to Consolo.

ing the loading, transportation, and discharge of the bananas."

The *Grace Line* decision clearly did not settle the matter of the shipping companies' obligations for the entire banana shipping industry.[6] The physical differences between Flota's and Grace's ships would make it more difficult for multiple shippers to load and stow on Flota's ships and might so disrupt its schedules as to require it to forego the carriage of bananas.[7] That Flota's contentions in this respect were far from frivolous is evidenced by respondents' justification, given in oral argument, for the Board's delay in acting on Flota's petition for declaratory judgment: "The complexity of the issues raised by Flota before the Board were not capable of resolution overnight; indeed, in reading the Examiner's decision on the violation phase of this proceeding, it goes into great detail over the loading problem and the refrigeration problem . . . ."[8] To suggest now that Flota could not have had a good faith

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[6] The Board held that Grace Line had not presented facts indicating that its discrimination was reasonable. It left open the possibility that, in some future case, another shipping company could show that its exclusive booking contract for the shipment of bananas was reasonable.

[7] It seems uncontroverted that Grace's vessels had two and three reefer holds each, only two decks in each hold, and permanent compartments, specially designed to carry bananas. Flota's single reefer hold was designed to carry frozen cargo and had, *inter alia*, three decks; no compartments, fewer and smaller side ports; steeper (and hence more difficult to use) exterior and interior ramps; heavy cumbersome hatch plugs; and greater problems of refrigeration, exhaust, opening, closing and leakage of air.

[8] In its decision, the Commission also justified its delay as necessary because of the "complex and lengthy hearing into the physical characteristics and utilization of its [Flota's] vessels so far as the banana trade was concerned."

belief that these differences were significant,[9] after lengthy hearings were required by the Board to satisfy itself whether or not they were dispositive, is to ignore substantial justifications for Flota's course of action in May 1957.[10]

Besides its grounds for factually distinguishing the 1957 *Grace Line* case, Flota might have thought in good faith that its renewal agreement with Panama Ecuador was permissible within the standards set forth in the *Grace Line* decision. That decision states that once the shipping company has properly entered into a forward-booking agreement with one or more shippers for a reasonable period, qualified shippers who subsequently applied for space "would be foreclosed from any proration in the space until the end of . . . [the] given period." 5 F.M.B. at 285. Flota might reasonably have thought that its contract with Panama Ecuador was such a legitimate forward-booking agreement.

The Board's 1957 report in *Grace Line* stated that the duty to apportion space among several shippers arises

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[9] The Hearing Examiner in the 1957 *Grace Line* case noted that even as to Grace's superior facilities "*Consolo's* Ecuador manager is thoroughly convinced that utter confusion would exist were there a number of shippers of bananas." (Emphasis supplied.) And the Examiner here found that "the problems attendant upon the use of the Flota facilities may be more accentuated than those encountered by the shippers of bananas on the Grace vessels."

[10] It is worth noting that the banana shippers consolidated their shipments under a single operating corporation for purposes of shipping on Flota, after it opened its reefer space for multiple use in June 1959. This development lends credence to Flota's asserted belief that its reefer space was unsuitable for use by several shippers operating independently. Nothing in the 1957 *Grace Line* decision suggests that a shipping company whose ships *cannot*, as a matter of economic fact, be used for shipping by more than one banana shipper, must apportion its space among qualified shippers in the hope that they can arrange to unify their operations.

"where the demand for space exceeds the supply."[11] 5 F.M.B. at 284. That report left open the question of what efforts a steamship company must make to interest shippers in its space. It stated that a shipping company must provide "reasonable notice" before entering a forward-booking arrangement.[12] 5 F.M.B. at 286. Flota might reasonably have thought that its actions in 1955 and 1957 satisfied the requirement of providing notice to other shippers. In 1955, just prior to its entering into the basic contract with Panama Ecuador, it advertised for shippers, but received no bids in response to its advertisements. In 1957, prior to Panama Ecuador's exercise of its option, on advice of counsel, Flota considered proposals from other bidders. Pursuant to this policy, Flota gave notice to Consolo on February 26, 1957, advising him to submit a bid for the refrigerated space by a given date. There was nothing in this letter suggesting that Consolo could only bid for Flota's *entire* refrigerated space. Consolo and another bidder bid only for the exclusive use of the entire space.[13] No bids for less than all the space were received. While the Board could reasonably insist that Flota's obligation was actively to solicit apportioned bid-

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[11] The Second Circuit in Grace Line, Inc. v. Federal Maritime Board, 280 F. 2d 790, 792 (1960), tacitly recognized the possibility that a carrier may enter into an exclusive contract where "there are no competing shippers for the space granted to a preferred shipper."

[12] The order, issued on August 19, 1957, after the Panama Ecuador renewal had been executed, is more specific. It states that Grace

> "shall offer to its present shippers and to all qualified shippers . . ., upon a fair and reasonable basis and upon reasonable notice, refrigerated space for the carriage of bananas . . . ." 5 F.M.B. 287.

[13] We have already indicated that Flota incurred no liability for rejecting these bids. See 112 U.S. App. D.C. at 310, 302 F. 2d at 895.

ding rather than merely to accept offers for apportioned space, this issue was certainly not *settled* by either *Grace Line* report.

Furthermore, Flota could reasonably have believed that the three-year period in its contract with Panama Ecuador, made in compliance with its existing contract obligation and formalized after no bids for an allocation of space had been received, was reasonable under Board standards. The agency found it "impossible to understand" that Flota could, in good faith, entertain such a belief. Yet the Board had held Grace's two-year contracts to be of reasonable duration "in view of the economic problems presented here [in Grace's case]." Given Flota's previous unsatisfactory experience in selling its reefer space, compared to the vigorous competition among shippers for Grace's superior facilities, the Board might well have found a three-year period to be permissible in Flota's case.

The above factors, in our view, justify Flota's doubts in May, 1957, as to whether it had a legal obligation to cancel its contract with Panama Ecuador.

On August 23, 1957, Consolo demanded a portion of the space on Flota's vessels, threatening legal action if Flota did not comply with its demands. Panama Ecuador threatened legal action if Flota leased any of its space to Consolo. Contrary to the Commission's assertion, there is no evidence to suggest that Flota was reluctant to repudiate its contract with Panama Ecuador "because it preferred the advantages of its long-term exclusive arrangement." Rather, in the face of pressures from both sides and uncertain as to its legal duty, Flota, on October 1, 1957, requested a ruling from the staff of the Board. Having received no answer to its request, on October 30, 1957, Flota petitioned the Board for a declaratory order. Not until six months had passed—on May 1, 1958—did the Board even assign a docket number to this petition; at that time it consolidated Flota's petition with Consolo's complaint

seeking reparations, notwithstanding Flota's constant attempts to have its petition promptly determined, without introducing the complicated reparation issue.[14] We need not undertake a detailed examination of the specific incidents of delay. Suffice it to point out that the principal reason for much of the further delay until mid-November 1958, when Flota presented its case, was Consolo's insistence on consolidating its reparation claim with Flota's petition. Furthermore, regardless of the cause of the delay, the fact remains that virtually the entire period for which reparations were assessed covered the time when Flota's petition for a declaratory order was pending before the Board. Confronted with a difficult choice on the basis of uncertain law, Flota had sought an administrative determination of its duties as promptly as possible. On the facts of this case, it would be inequitable to make Flota pay for the Board's delay in reaching a conclusion.

Despite these factors indicating the inequity of the assessment of damages against Flota under the circumstances, the Commission nevertheless declared that "Flota . . . is seeking to escape the consequences by passing the burden of its wrongdoing on to the party who bore the pecuniary brunt thereof. This does not appeal to our sense of equity." We think, however, that Consolo's position is hardly deserving of greater sympathy than Flota's. In the first place, the only "pecuniary brunt" which he bore was the loss of unrealized profits he might have made had he utilized the space which Flota failed to make available. Although Flota's action deprived Consolo of potential profits, there is no evidence that Flota in any way benefited by its exclusion of Consolo. The damages assessed by the Board are not designed to deprive Flota of illegal profits; indeed,

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[14] Subsequently, on November 14, 1958, over a year after Flota first petitioned for a declaratory order, the trial examiner severed the reparation issue. A reparation order did not issue until March 30, 1961.

they bear no relation to the profits Flota did or did not make on its contract with Panama Ecuador. The latter, the party which benefited from the allegedly illegal arrangement to the detriment of Consolo, was not compelled (by the nature of the remedy) to part with its "illegal" profits. In addition, Consolo himself for four years prior to the Board's 1957 *Grace Line* order (effective October 1, 1957), had received the pecuniary benefits of a preferential arrangement with Grace Lines, held to be unlawful. He was never compelled to give up those profits to shippers that had been excluded.

In view of the substantial evidence showing that it would be inequitable to assess damages against Flota in favor of Consolo, we must conclude that the Commission abused the discretion granted it under Section 22 of the Shipping Act[15] in imposing reparations on petitioner. Accordingly, we reverse the Commission's decision of September 18, 1963, and direct it to vacate its reparation order issued thereunder.[16]

So ordered.

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[15] 46 U.S.C. § 821.

[16] In view of our disposition of this case it is unnecessary to consider petitioner's objection to the active participation of the Commission's counsel, who had earlier appeared before this court as an adversary, in the formulation and writing of the Commission's remand opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,330

FLOTA MERCANTE GRANCOLOMBIANA, S.A., PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS,

PHILIP R. CONSOLO, BANANA DISTRIBUTORS, INC.,
INTERVENORS.

No. 16,366

PHILIP R. CONSOLO, PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS,

FLOTA MERCANTE GRANCOLOMBIANA, S.A., INTERVENOR.

No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS,

PHILIP R. CONSOLO, INTERVENOR.

On Petitions for Review of Orders of the Federal Maritime Board, now Federal Maritime Commission.

Decided April 26, 1962

Mr. J. Alton Boyer, with whom *Mr. Odell Kominers* was on the brief, for petitioners in No. 15,330 and No. 16,369

and for intervenor in No. 16,366. *Mr. T. S. L. Perlman* also entered an appearance for petitioner in No. 15,330.

Mr. Robert N. Kharasch, with whom *Mr. William J. Lippman* and *Mrs. Amy Scupi* were on the brief, for petitioner in No. 16,366.

Mr. Thomas D. Wilcox, Attorney, Federal Maritime Commission, with whom *Messrs. James L. Pimper*, General Counsel, Federal Maritime Commission, and *Robert E. Mitchell*, Deputy General Counsel, Federal Maritime Commission, were on the brief, for respondents. *Mr. Edward Aptaker*, Assistant General Counsel, Division of Regulations, Federal Maritime Commission, at the time the brief was filed, was on the brief for respondents in No. 15,330. *Mr. Irwin A. Seibel*, Attorney, Department of Justice, was on the brief for respondents in No. 15,330, and also entered an appearance for respondent United States of America in No. 16,366 and No. 16,369. *Mr. Richard A. Solomon*, Attorney, Department of Justice, was on the brief for respondents in No. 16,366 and No. 16,369 and also entered an appearance for respondent United States of America in No. 15,330.

Mr. Robert N. Kharasch, with whom *Mr. William J. Lippman* was on the brief, for intervenor Philip R. Consolo in No. 15,330 and No. 16,369. *Mr. George F. Galland* also entered an appearance for intervenor Philip R. Consolo in No. 15,330 and No. 16,369.

Messrs. Richard W. Kurrus and *James N. Jacobi* were on the brief for intervenor Banana Distributors, Inc., in No. 15,330.

Before WILBUR K. MILLER, Chief Judge, and BAZELON and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge:* These cases raise issues concerning the grant of reparations by the Federal Mari-

time Board[1] to Philip R. Consolo, a banana shipper, against Flota Mercante Grancolombiana, S.A. ("Flota"), a steamship company, for Flota's allegedly discriminatory treatment of Consolo, who sought space on Flota's vessels for the shipment of bananas from Ecuador to the United States.

In our case No. 15,330, Flota challenges an order of the Board, dated June 22, 1959, in which the Board found Flota to be a common carrier of bananas between the United States and Ecuador, and to have discriminated against Consolo in the allocation of space, in violation of Sections 14 and 16 of the Shipping Act of 1916, as amended, 46 U.S.C. §§ 812, 815 (1958).[2] In No. 16,369, Flota challenges a later order of the Board, issued March 30, 1961, directing Flota to pay Consolo some $143,370.98 as reparations for the conduct condemned in the order of June 22, 1959. In No. 16,366, Consolo challenges the award of March 30, 1961, as inadequate.[3]

I.

We will take up first the issues presented in No. 15,330. The background of the controversy may be briefly stated. The Grace Line, another steamship company, offered a

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[1] The Federal Maritime Board has recently been succeeded by the Federal Maritime Commission. See Reorganization Plan No. 7 of 1961, 26 Fed. Reg. 7315. Most of the references in this opinion will be to the Board, but this should be considered as including the Commission, where appropriate.

[2] No. 15,330 was originally held in abeyance pending the outcome of Grace Lines, Inc. v. Federal Maritime Board, 280 F. 2d 790 (2d Cir. 1960), *cert. denied*, 364 U.S. 933 (1961), a similar case.

[3] Flota is petitioner in No. 16,369, as well as in No. 15,330, and intervenor in No. 16,366. Consolo is petitioner in No. 16,366, and intervenor in No. 15,330. Banana Distributors, an independent importer of bananas which is in substantially the same position as Consolo, is also an intervenor in No. 15,330.

year-round regularly-scheduled weekly service to North Atlantic ports with vessels containing refrigerated ("reefer") cargo space suitable for carrying bananas. Flota offered a generally similar service. In a proceeding against the Grace Line, the Maritime Board ruled that under the Shipping Act that line was a common carrier, and must offer refrigerated space to all qualified banana shippers. *Banana Distributors, Inc.* v. *Grace Line, Inc.*, 5 F.M.B. 615 (1959), aff'd sub nom. *Grace Line, Inc.* v. *Federal Maritime Board*, 280 F.2d 790 (2d Cir. 1960), cert. denied, 364 U.S. 933 (1961); see also *Consolo* v. *Grace Line, Inc.*, 4 F.M.B. 293 (1953). Since that ruling, Grace has carried bananas for a number of shippers. Flota, however, has carried bananas since 1950 under special contracts giving the contracting shippers the exclusive use of Flota's refrigerated facilities. In August 1957, following the Board's first decision in the *Grace* cases, Consolo made a written demand on Flota for a fair share of Flota's refrigerated space. This was refused. On October 30, 1957, Flota filed a petition with the Board for a declaratory order determining whether or not Flota was required to cancel its existing contracts for banana shipment. On November 15, 1957, Consolo filed his complaint. Banana Distributors, a banana shipper similarly situated, filed its complaint thereafter. The three proceedings—the petition for a declaratory order and the two complaints—were consolidated for hearing.

At an early stage, the Examiner ruled that he would defer the taking of evidence on the measure of reparation due the complainants until after the merits of the complaints were decided. The merits were determined in Consolo's favor by order of the Board dated June 22, 1959, and it is this order which Flota seeks to have reviewed in No. 15,330. At a proceeding commenced after the decision on the merits, evidence of damages was taken, and the Board entered a Report and Order on March 28, 1961, directing Flota to pay Consolo $143,370.98 in reparations.

The threshold question in No. 15,330 is whether the Board could properly find, as it did, that Flota violated Section 14 Fourth and Section 16 First of the Shipping Act of 1916.[4] Flota argues that the issue whether it had violated these sections of the Act was not properly before the Board when the latter rendered its Report and Order of June 1959. The Board's Examiner had ruled, as we have seen, that the proceeding would be heard in two phases. In essence, Flota contends that the first phase was concerned only with the question whether or not Flota was a common carrier of bananas, and that all remaining issues, including the crucial question whether Flota was in violation of the Shipping Act, were reserved for the sub-

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[4] Section 14 of the Shipping Act of 1916, 46 U.S.C. § 812, provides in part as follows:

> "No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—
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> "Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage . . . ."

Section 16 of the Act, 46 U.S.C. § 815, provides in part:

> "It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—
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> "First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

sequent proceeding.[5] As a corollary, Flota claims that in the first proceeding it was deprived of a proper hearing on the question of violation of the Act because it put on complete testimony only with respect to the common carrier issue.

The literal language used in making, and granting, the motion for a severance of the hearing can probably be read in such a way as to lend some support to Flota's contention. Thus, counsel for Banana Distributors, in moving to sever, said "we would like an immediate decision . . . on the question of whether or not the Grancolombiana Line is a common carrier" and "if the Grancolombiana Line is found not to be a common carrier, that would end the case." The Board explains this language by saying that the term "common carrier issue" was a kind of oral shorthand for the concept of violation of Flota's duties as a common carrier under the Shipping Act.

Be that as it may, a careful reading of the record leads us to the conclusion that the only matter removed from the first proceeding was the question of the quantum of damages, not the issue of violation of the Shipping Act. Such in our view must or should have been the understanding of all parties, including Flota. In granting the motion to sever, the Examiner stated: "We ought to proceed with the merits." It is difficult to imagine the "merits" as excluding the issue of whether Flota had violated the Act. And in requesting separation, counsel for Banana Distributors spoke only of "our damage case" and "the damage part of this proceeding" as belonging in the second stage of the hearings. Moreover, counsel described the

[5] Consolo argues that Flota is making this argument for the first time before this court. But in its Request for Oral Argument and Exceptions to the Examiner's recommendation, Flota said: "5—Flota excepts to the finding that it violated Sections 14 Fourth and 16 First of the Act on the further ground that such a finding was without the scope of the proceedings."

motion to sever as "a severance of the proceeding just like was done in the Grace Line case." It seems to us that the parties must have understood this as a reference to the closely similar and very recent *Grace* case, in which the common carrier and violation issues were treated together.[6] Similarly, in two earlier Board cases which involved separated proceedings only the question of the extent of the damages was left to the second hearings. See *Roberto Hernandez, Inc.* v. *Arnold Bernstein Schiffartsgesellschaft*, 1 U.S.M.C. 686 (1937), 2 U.S.M.C. 62 (1939), aff'd, 116 F.2d 849 (2d Cir. 1941); *Waterman* v. *Stockholms Rederiaktiebolag Svea*, 3 U.S.M.C. 131 (1949).[7]

In moving for a severance, counsel for Banana Distributors clearly informed the Examiner and other counsel that his purpose was to "get on the Grancolombiana Line ships as promptly as possible." Given that purpose, it would have been pointless to restrict the case to the sole inquiry whether petitioner was a common carrier. For even if Flota were found to be a common carrier, this in itself would not get Consolo on Flota's boats if Flota's denial of space to Consolo was not an "unjust" or "unreasonable" discrimination.

Our conclusion that Flota should have known that the question of its violation of the Act was in issue is borne out

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[6] Numerous statements by counsel for Flota throughout the proceedings unmistakably indicate that Flota understood "the Grace Line case" to be the 1959-60 litigation. Questions of statutory violation were treated in the first half of the Grace proceeding, and were reviewed—and the Board ultimately affirmed—by the Court of Appeals for the Second Circuit in Grace Line, Inc. v. Federal Maritime Board, 280 F. 2d 790 (1960), while the issue of the quantum of reparation had been deferred for further Board proceedings.

[7] It may be noted that the Shipping Act itself, at Sections 29 and 30, recognizes a distinction between Board orders requiring the payment of money and other orders. See 46 U.S.C. §§ 828, 829 (1958); 46 C.F.R. § 201.251 (1958).

by indications that Flota did in fact know this. In its own brief to the Examiner, Flota recognized that the legality of its conduct was in question. It argued that "denial of space violates the Shipping Act only if it constitutes an unjust discrimination between competitors." It concluded its brief by arguing that its contracts "do not violate Section 16, First or Section 14, Fourth of the Shipping Act, 1916."

Finally, in its presentation of evidence and argument below, Flota went far beyond the "common carrier" question. It contended before the Examiner that even if it was a common carrier, it could not as a practical matter offer its refrigerated space on a non-discriminatory basis. It also argued that complainants had not shown that they were prejudiced or unjustly discriminated against because, according to petitioner, they had failed to show that they were competitors of Panama Ecuador, the favored shipper. Flota's presentation of its case in the first phase of the hearing is inconsistent with the position it now advances.[8] We conclude that the Board properly had before it the issue whether Flota had violated the Shipping Act.

We turn to the Board's findings that Flota was a common carrier, and that it had violated Section 14 Fourth and

[8] At no point in the first hearing was Flota prevented from putting on any evidence it desired relevant to the issue of violation of the Act. Not until its reply brief before this court did Flota seek to explain with any degree of specificity what facts it would have offered that it did not actually present in the first hearing. Flota argues that if it had known that the question of its violation of the Act was in issue in the first proceeding, it would have then put on certain evidence which it actually put on only in the reparations hearing. The evidence referred to in Flota's reply brief primarily goes to support Flota's contention that Consolo really did not need reefer space on Flota's vessels. This may be relevant to show mitigation of damages. But it would be of doubtful value in justifying Flota's discriminatory refusal to carry bananas for anyone other than the favored shipper. Flota has at no time suggested that it has any other evidence available.

Section 16 First of the Shipping Act. Flota argues that it was not a common carrier of bananas. But Flota as to most commodities is admittedly a common carrier by water, and maintains a regularly scheduled and advertised cargo service between the west coast of South America and various ports in the United States. With the sole exception of bananas, which Flota regularly carries on the same vessels as other goods, Flota has carried cargo without discrimination, and without asserting a right to pick and choose among qualified shippers. But Flota charges the Board with error because the Board should have made "a finding as to petitioner's status in the carriage of bananas, without regard to its status in the carriage of other commodities not employing its reefer facilities." However, this precise argument was rejected in *Grace Line, Inc.* v. *Federal Maritime Board*, 280 F.2d 790 (2d Cir. 1960)—a decision with which we agree.[9] Flota began its defense before the Board by "assuming that the Grace Line decision [of the Board] is good, valid law, and we are not attacking that in any manner, shape or form." Flota sought to avoid the effect of the *Grace Line* cases by showing that Flota's operations and vessels were substantially different from those of the Grace Line. The Examiner and the Board took extensive evidence and considered this question at great length. The Board concluded: "The arguments relating to the differences between Flota's vessels and Grace's vessels are not impressive. . . . Operational difficulties and vessel limitations do not justify prejudice and discrimination otherwise undue and unrea-

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[9] Judge Hand went even further than it is necessary for us to go in this case. He indicated that a company's "status in the carriage of other commodities" was not only relevant, but might be determinative. "[T]here is every reason of declared policy to assume that the term [common carrier] was used to include all those who were to some degree 'common carriers.'" 280 F. 2d at 792. *Cf.* Louisville & Nashville R. Co. v. United States, 282 U.S. 740 (1931); Consolo v. Grace Line, Inc., 4 F.M.B. 293 at 300.

sonable." 5 F.M.B. at 639. We believe this finding by the Board to be adequately supported by the record.

Finally, Flota contends that the Board did not consider the reasonableness of Flota's actions, did not make a finding with respect thereto, and could not on the record have found that Flota acted "unjustly" or "unreasonably." But the Board's report said in explicit terms "We find no justification for this conduct on the part of Flota . . . ." As we have pointed out, the Board rejected Flota's argument that structural differences between Flota's ships and Grace's justified Flota's discrimination. It also rejected Flota's attempted justification based on vessel scheduling and shipper convenience. It ordered that space be made available to shippers on a "fair and reasonable basis." It noted that an appropriate forward-booking system would be just and reasonable, "as opposed to 'unjust' and 'unreasonable' which aptly describes the present system." Under the circumstances, we think it beyond question that the Board considered and made sufficient findings as to the reasonableness of Flota's conduct.

The Board's findings are supported by the record. Flota argues that it acted reasonably in refusing space to Consolo because Flota already had an exclusive contract with another shipper, Panama Ecuador, and because it sought to ascertain the legality of its conduct by petitioning the Board for a declaratory order. But the making and performance of the exclusive contract comprised the very conduct which constituted violation of the Act. Flota discriminated by favoring Panama Ecuador over Consolo—just as in the *Grace Line* case the carrier had made special contracts with favored shippers and had declined to serve others. Nor does Flota's action in petitioning for a declaratory order automatically excuse what would otherwise be a violation of the Act. Allowing the Board that measure of discretion due to it because of its expertise and status as an administrative agency, we think

it was entitled to conclude that neither the exclusive contract nor the request for a declaratory order rendered Flota's discriminatory refusal of space reasonable or just.

The Board's order of June 22, 1959, challenged in No. 15,330, will accordingly be affirmed.

II.

We turn now to the petitions in No. 16,366 and No. 16,369, dealing with the question of reparations.

Jurisdiction. Consolo has moved to dismiss Flota's petion in No. 16,369 for lack of jurisdiction, urging that this court cannot review orders awarding reparations, on petition of the party charged. Flota and the Board resist the motion, alleging that this court possesses jurisdiction to entertain the petition under the Administrative Orders Review Act of 1950 (the Hobbs Act), 5 U.S.C. § 1031 *et seq.* The Hobbs Act gives the courts of appeals exclusive jurisdiction "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" such final orders of the Federal Maritime Board as "are now subject to judicial review" pursuant to Section 31 of the Shipping Act, 46 U.S.C. § 830. Section 31 in turn provides that the venue and procedure in suits to enforce, suspend, or set aside any order of the Federal Maritime Board shall, "except as otherwise provided," be the same as in similar suits in regard to orders of the Interstate Commerce Commission. The relevant statutory provisions regarding I.C.C. orders are contained in 28 U.S.C. §§ 1336, 2321-25. Section 1336 states:

> "Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Since Section 1336 gives the District Courts broad jurisdiction to "set aside" I.C.C. orders, and the procedure for

Federal Maritime Board cases is similar by virtue of Section 31, the jurisdiction to set aside final orders of the Federal Maritime Board formerly possessed by the District Court under Section 31 of the Shipping Act appears to have been transferred to this court by the Hobbs Act.[10]

Our jurisdiction to review No. 16,366, in which Consolo attacks the reparations granted as inadequate, was not challenged. We agree that the case is properly here. Cf. *D. L. Piazza Co.* v. *West Coast Line*, 210 F.2d 947 (2d Cir.), cert. denied, 348 U.S. 839 (1954). If we are obliged to review the order at the complainant's instance, it would be anomalous if we could not review it at the instance of the party it holds liable. Once here, the order should be reviewable in its entirety, and the rights of all parties considered. Cf. *Inland Steel Co.* v. *United States*, 306 U.S. 153, 157 (1939).

We are well aware, however, that the jurisdictional problems in these cases are not free from doubt and difficulty. The Hobbs Act and Section 31 of the Shipping Act do not in terms purport to give us authority to render a money judgment based on a Board order awarding reparations, or to enforce any order of the Board. If a carrier chooses not to obey an order of the Board for payment of

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[10] Sections 2321-25 of Title 28 of the Code (formerly contained in the Urgent Deficiencies Act), and a number of cases cited by Consolo, such as Brady v. Interstate Commerce Commission, 43 F. 2d 847, 852 (N.D. W. Va. 1930), *aff'd per curiam on other grounds*, 283 U.S. 804 (1931), deal largely with the procedural question whether a reparations order of the Interstate Commerce Commission is reviewable by a three-judge district court or a single judge court. *Cf.* United States v. Interstate Commerce Commission, 337 U.S. 426 (1949). Congress, in passing the Hobbs Act, could hardly have intended to retain this distinction, with respect to Maritime Board orders. We note, also, that Section 31 specifically refers to suits to "enforce, suspend, or set aside" Board orders; the Hobbs Act adds to this by including suits to determine the validity of such orders, but subtracts from it by omitting any reference to their enforcement.

reparations, even after affirmance by this court, it may be that to obtain enforcement the complainant would be forced to go into the District Court in a suit under Section 30 of the Shipping Act, 46 U.S.C. § 829. The defendant in such a Section 30 suit would be free to demand a jury trial and to introduce evidence not previously before the Board. In the trial the order and findings of the Board would, by the terms of the statute, be given only prima facie effect. The ultimate result reached in the District Court might vary considerably from the Board's order.[11] Conceivably, a jury might find the carrier to be free of any liability whatever. And any final judgment rendered could be appealed to the appropriate court of appeals, which might not be the same one which had reviewed the order in the first instance. A strong argument can be made that only one review should be permitted, and that we should not undertake to review the Board's reparations order at the present stage, in any respect. We have considered these difficulties in reaching our conclusion. But we think it clear that Congress intended, in the Hobbs Act, to clarify and simplify the review situation as much as possible, rather than to perpetuate distinctions between awards, denial of awards, and other Federal Maritime Board actions, unless such distinctions are inevitable. See H.R. Rep. No. 2122, 81st Cong., 2d Sess. 3 (1950); cf. *Pennsylvania R. Co.* v. *United States*, 363 U.S. 202 (1960); *D. L. Piazza Co.* v. *West Coast Line, Inc., supra.* We think that Congress intended us to review reparations orders, at least to the extent necessary "to determine the validity"

[11] We do not, of course, wish to minimize the res judicata effect of our decision. See In re Federal Water & Gas Corp., 188 F. 2d 100 (3d Cir. 1951), *cert. denied sub nom.* Chenery Corp. v. Securities and Exchange Commission, 341 U.S. 953 (1951). Our determination of the issues dealt with in No. 15,330, for example—such as the issue as to whether or not Flota violated the Act—is undoubtedly binding on Flota and the other parties. Flota chose to come to this court—it cannot reject our decision.

of such orders on appropriate petition, and that it is our duty to do so.

The scope of our review in Nos. 16,369 and 16,366 also presents difficulties. Questions of law, such as matters of jurisdiction and fair administrative procedure, are obviously for our determination. Cf. *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U.S. 541, 547 (1912). But in reviewing the evidence, we are confined to a much more restricted standard, as the Administrative Procedure Act, §§ 1 et seq., 5 U.S.C. §§ 1001 et seq. (1958), and a long line of Supreme Court decisions, clearly indicate. See, e.g., *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951); *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 489 (1942). We have examined the appeals from the reparations award with these considerations in mind.

The Merits. In No. 16,366, Consolo seeks additional reparations. He questions the Board's denial of pre-judgment interest. But the cases cited by Consolo, such as *Louisville & N.R. Co.* v. *Sloss-Sheffield S. & I. Co.*, 269 U.S. 217 (1925), only demonstrate that recovery of interest is not barred, not that the granting of interest is mandatory. We find that the Board did not abuse its decretion in denying interest. Cf. *Dorsett* v. *Shore*, 254 F.2d 373, 377 (4th Cir. 1957); *Miller* v. *Robertson*, 266 U.S. 243 (1924); *Board of County Comm'rs of the County of Jackson* v. *United States*, 208 U.S. 343 (1939).[12] Consolo also claims reparations from the time he first demanded space. The Board calculated the reparations from the time Consolo first demanded an *allotment* of space. Prior to that time, he was unsuccessfully bidding for an exclusive patronage contract for Flota's entire reefer space. This is exactly the kind of exclusive contract which Con-

[12] For similar reasons we, reject Flota's argument that the Board's award of interest on "amounts unpaid after 60 days," from March 30, 1961, was erroneous.

solo now claims was illegal and damaging to him. Under these circumstances, we think the Board was reasonable in declining to begin the reparations period at an earlier date than the time Consolo first attempted to secure a fair and equitable portion of space. Finally, Consolo, like Flota, is dissatisfied with the 18.46% of the total computed net profit awarded to Consolo. Flota says Consolo should only have received 15.58% since this is the only amount of space *it says* it would have given him. Consolo wants 33⅓%, arguing that there were only three qualified shippers during the reparation period, and hence he should have been allocated one-third of Flota's banana space. Yet it hardly seems reasonable to say that all qualified shippers must be given equal space, regardless of the applicant's size, facilities, financial position, and ability to arrange for the loading and discharging of the cargo. The Board's selection of 18.46% was based on an allotment to and use by Consolo of that percentage of the cubic capacity of Flota's ships on the United States Atlantic run in actual practice over a period of time. Perhaps the Board might have chosen a better yardstick. Perhaps not. We are surely unable, however, to say that the Board's choice was arbitrary or unreasonable. We therefore find no merit in Consolo's petition in No. 16,366.

In No. 16,369, Flota seeks to avoid the payment of reparations primarily by arguing that it did not violate the Shipping Act. To the extent that a number of its contentions in this regard have already been dealt with in our consideration of No. 15,330, we will not repeat them here.

Flota makes a number of additional arguments.[13] It first claims that there was no proof or finding of actual

[13] Flota also argued that the Board misconstrued its function vis-a-vis the Examiner. The statement of the Board upon which this connection is based has been taken out of context as quoted in Flota's brief. Neither other statements by the Board nor its actions will support Flota's claim in this regard. The argument that Consolo's claim for reparation was untimely is similarly without merit.

competition between Consolo and Panama Ecuador. But though the express words "we find competition existed" are not employed, the entire decision of the Board is implicit with the finding of such competition. For example, the Board repeatedly refers to the fact that "Panama Ecuador, in receiving and using that space [of Flota], was favored and advantaged." 5 F.M.B. 638-39. And the Board explicitly speaks of Flota denying space "to a qualified competitor." 5 F.M.B. 639. In context, the word "competitor" clearly refers to Consolo, in relation to Panama Ecuador.[14] Moreover, granting to the Board the right to draw reasonable inferences, we believe that there is sufficient evidence in the record to support a finding of competition, especially since Consolo and Panama Ecuador were both dealing in exactly the same commodity at the same time, were both "independents," and both shipped extensively to many of the same seaports.

One of Flota's principal arguments, however, was and is that the Board erred in failing to hold that it would be inequitable to award reparations to Consolo. Flota marshaled substantial evidence in support of its contention. It pointed to the unsettled nature of the law in the field, as illustrated by the fact that the Second Circuit in the first *Grace Line* case reversed the Board's order and remanded it, concluding that the legal theory adopted by the Board was erroneous. 263 F.2d 709 at 711. In the second case (which was not decided until July 1960), the majority agreed with the Board's new approach to the case, but Judge Moore filed a strong dissent, 280 F.2d 790. At the hearing in this case, Flota advanced evidence of factual differences between its situation and that of the Grace Line. While this would not necessarily justify Flota's conduct, it might well lead to the conclusion that

[14] The Board also noted Flota's exception No. 16 to the Examiner's failure to make a finding of competition between Consolo and Panama Ecuador. The Board found that "the 16th exception is unsupported by the record."

Flota in good faith believed that the *Grace Line* case was distinguishable. Flota also complained, with some justification, of the two-year delay of the Board in rendering a declaratory order.[15] Moreover, Flota already had signed an exclusive contract with Panama Ecuador covering what may well have seemed to be, in the light of the Board's decision in the *Banana Distributors* cases, 5 F.M.B. 278 (1957), and 5 F.M.B. 615 (1959), a reasonable period of time. By granting space to Consolo and other shippers when first requested, Flota might have opened itself to possible liability for breach of the contract with Panama Ecuador, at least in the absence of a declaratory order from the Board. Finally, Flota pointed out the difficulties and delays in loading which would result if more than one shipper were to use Flota's refrigerated space, and Consolo's apparent failure to utilize all of the space available to him on Grace Line vessels. The Board took up most of these points individually and disposed of them briefly.[16] But the essence of Flota's argument was that the cumulative weight of all the circumstances, and not

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[15] Flota clearly indicated at the first hearing that it would obey any order rendered by the Board. Flota upon the issuance of the Board's order complied with it. Thus, a prompt declaratory order would have served a primary purpose envisaged for it under the Administrative Procedure Act—to assist a party in governing its conduct without rendering itself liable to suit. See Administrative Procedure Act § 5(d), 5 U.S.C. § 1004(d) (1958). The result here is that the Board is making Flota pay reparations for the period of the Board's delay.

[16] The Board's holdings as to its delay in rendering a declaratory order, and as to the Panama Ecuador contract, were in effect conclusionary rejections of Flota's arguments. The Board answered Flota's contention that the law was unsettled by assuming that the law was settled by the Grace Line cases, a doubtful assumption at that stage. Finally, the Board felt that the operational difficulties of multiple loadings could be overcome by "the ingenuity of practical men." But Flota suggests that later events have shown that the Board was mistaken.

any one circumstance, rendered it inequitable to require reparations. We are not prepared, on appeal, to go this far; but we do consider, in light of the Board's decision and the damages it imposed, that the Board failed to give adequate consideration to this issue. The Board may have erroneously believed (1) that it was required to grant reparations once it found a violation of the Act,[17] or (2) that all of the issues as to the reasonableness or equity of Flota's conduct were determined in the first phase of the proceeding.[18] In any case, we shall remand to the agency to consider whether, under all the circumstances, it is inequitable to force Flota to pay reparations, or at least inequitable to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board.[19]

The Board's order of June 22, 1959, challenged in No. 15,330, is affirmed; the order of March 30, 1961, challenged in Nos. 16,366 and 16,369, is set aside, and the matter remanded to the agency for further proceedings not inconsistent with this opinion.

So ordered.

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[17] Section 22 of the Shipping Act provides only that the Board "may" direct the payment of reparation. 46 U.S.C. § 821 (1958).

[18] We have concluded that the Board could properly find after the first hearing that Flota had violated the Act. But this does not mean that the circumstances of its violation could not be examined at the second hearing in an effort to reach a fair conclusion as to whether any reparations should be assessed.

[19] Our disposition of the case makes it unnecessary for us, at least at this time, to consider the remaining issues raised on this appeal. Thus, should the Board decide, on remand, that a different measure of reparations is warranted, Flota's arguments as to the calculation of damages might be rendered moot.

APPENDIX D

FEDERAL MARITIME BOARD

No. 827

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

No. 827 (Sub. No. 1)

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S. A.

Submitted January 25, 1961 Decided March 28, 1961

Complaint found injured to the extent of $143,370.98 by respondent's refusal to allocate, between August 23, 1957 and July 12, 1959, refrigerated space on respondent's ships for the carriage of bananas from Ecuador to North Atlantic ports of the United States, and reparation in such amount is awarded.

Robert N. Kharasch and *William J. Lippman* for complainant, Philip R. Consolo.

Odell Kominers, Renato C. Giallorenzi and *John H. Dougherty* for respondent, Flota Mercante Grancolombiana, S. A.

Report of the Board

Thomas E. Stakem, Chairman; Sigfrid B. Unander, Vice Chairman; Ralph E. Wilson, Member

By the Board.

I. Proceedings

By an order on June 22, 1959 the Board ordered that the proceeding docketed as No. 827 be held open for further proceedings on the claim of complainant, Philip R. Consolo (Consolo), for reparations, if any, (5 F.M.B. 633, 641) pursuant to Sec. 22 of the Shipping Act, 1916, as amended, (Act). The present proceedings are in response to a complaint to Docket No. 827 filed November 15, 1957 by Consolo requesting an order by the Board ordering Flota Mercante Grancolombiana, S. A. (Flota) to pay reparation for damages during the period November 4, 1955 through November 4, 1957 in the amount of $600,000. and other relief and to a supplemental complaint filed November 18, 1959 (Docket No. 827, sub. No. 1) by Consolo requesting an order by the Board ordering Flota to pay reparation for damages during the period November 15, 1957 through September 1, 1959, in the sum of $250,000. and for other relief.

By its report and order of June 22, 1959, served July 2, 1959, in *Philip R. Consolo et al.* v. *Flota Mercante Grancolombiana, S. A.*, 5 F.M.B. 633 (1959) the Board found Flota to be a common carrier by water in the operation of ships between the west coast ports of South America and United States Atlantic ports and found Flota's practice of contracting all of its refrigerated space on its ships operating between Ecuador and ports on the North Atlantic coast of the United States to a single shipper to be unjustly discriminatory and unreasonably prejudicial in violation of the Act.

The further proceedings and hearing on the claim for reparations were had by an examiner who, on October 5, 1960, submitted a recommended decision that reparations were due in the amount of $259,812.26. Exceptions and replies thereto were filed. Oral argument before the Board was held on January 25, 1961.

II. Facts

Consolo, an experienced and qualified shipper of bananas for many years between Ecuador and the United States was found to have proven his complaint that Flota's practice of excluding him was in violation of Secs. 14 and 16 of the Act. The Board's findings of fact, conclusions, decision and order on this phase of the proceedings were entered of record and reported in *Philip R. Consolo et al.* v. *Flota Mercante Grancolombiana, S. A.* (Supra).

In its report the Board found that Flota in the operation of its freight ships between Ecuador and the U. S. North Atlantic ports and U. S. Gulf of Mexico ports is a common carrier by water in the foreign commerce of the U. S. (page 638). No date was established for the beginning of such status, but Flota was shown to have operated since July 20, 1955 between Ecuador and the U. S. on an approximately weekly schedule with 5 ships and that it now operates 6 ships. Consolo did not use any of these ships until September 1, 1959.

Consolo first expressed an interest in space in the Spring of 1955 when he had a conference with Flota officers and "made inquiry as to the height of each chamber [for banana storage] and then the rate they were asking for the ships". He inspected a ship later and found fault with the height of the storage chamber. Consolo was given figures as to what Flota "wanted for the ships in its entirety" (sic) but he asked for a reduced rate on the lower chamber or for the two upper chambers at the proposed rates. The counter offers were rejected. Other negotiations, for a contract by correspondence and by conversations in 1956 and 1957, did not result in a mutually acceptable arrangement. At no time before August 23, 1957 did Consolo ask for an allotment of space at a regular tariff rate, but accepted the prevalent trade custom of either bidding or negotiating for space on a contractual basis.

Consolo proved that he could have bought and sold 5,000 to 15,000 additional stems of bananas if Flota had allotted him space.

By a letter dated August 23, 1957 addressed to Flota at Bogata, Colombia, Consolo wrote asking "to be considered for a fair and reasonable amount" of space on Flota's ships. The letter referred to our dockets Nos. 771 and 775 as the basis for this request. Flota's reply dated October 7, 1957 was that "reefer space on our vessels has been committed for the next two years".

By its order of June 22, 1959, served July 2, 1959 the Board ordered Flota to cease and desist and to abstain from entering into, or continuing or performing any of the contracts, agreements, or understandings for the carriage of bananas, found herein to be in violation of sections 14 and 16 of the Shipping Act, 1916 as amended, not later than August 1, 1959". Respondent was also ordered to offer, within 10 days after July 2, 1959, all qualified banana shippers refrigerated space for the carriage of bananas. No proofs were introduced in the present proceeding to show how this order was complied with. An allotment of space was made by Flota September 1, 1959 when Consolo was one of five qualified shippers who applied for and were allotted space.

III. Discussion

Sec. 22 of the Act authorizes any person to file a sworn complaint "asking reparation for the injury, if any," caused by any violation of the Act. Exclusion of complainant, Consolo, from the use of Flota's common carrier service from Ecuador has been found to be a violation of the Act. Consolo filed a sworn complaint asking for reparations. An examiner conducted proceedings in which the issues were limited to ascertaining the period of injury and the computation of the amount due as damages for injury. The examiner recommended that complainant is entitled

to reparation in the amount of $259,812.56 based on 105 voyages during the period August 23, 1957 to September 1, 1959, yielding a net profit of $779,436.78 of which Consolo was entitled to one-third.

In interpreting Sec. 22 in *R. Hernandez* v. *A. Bernstein Schiffahrtgesellschaft* 1 U.S.M.C. 686 (1937) the U.S. Maritime Commission held that defendants unjustly discriminated against complainant in violation of paragraph Fourth of Sec. 14 of the Act by refusing to book cargo in response to applications by complainants for the transportation of automobiles. Complainant was shown to have exported unboxed automobiles by securing steamship booking and then purchasing the automobiles therefor. Complainant was also shown to have the ability to obtain automobiles for shipment. In some cases complainant also had small lots of automobiles available in New York ready to ship to Bilbao, Spain before booking. Defendants were shown to have held themselves out as common carriers of unboxed automobiles from New York to Bilbao. Their ships were constructed to accommodate automobiles and capacity was available. The number of automobiles required to fulfill complainant's contract to sell to a dealer in Spain was shown. Complainant proved a loss of 15% profit on prospective shipments. Proximate injury was held to have been caused complainant because of his inability to supply automobiles pursuant to an agreement with the importer in Spain. The case was assigned further hearing to determine the amount of reparations due, in the absence of evidence (1) that all of the cars upon which reparation was based could have been carried by defendants, (2) as to the amount of space which was available and, (3) as to the value of the cars which could have been carried in such available space.

In *Roberto Hernandez, Inc.* v. *Arnold Bernstein, S., M.B.H.* 2 U.S.M.C. 62 (1939) the above elements were proven and reparations equal to the estimated net profits

that would have been earned during the reparations period were established.

The defendants having failed to comply with the order, the appellant brought suit for enforcement pursuant to Sec. 30 of the Act. The defendants resisted enforcement on the ground that (1) there was no basis for the plaintiff's claim and (2), it was plaintiff's duty to mitigate any damages. The District Court agreed in *Roberto Hernandez, Inc.* v. *Arnold Bernstein S., M.B.H.*, 31 F. Supp. 76 (D.C. N.Y. 1940), but on appeal Circuit Court, reversed in 116 F. 2d 849 (C.C.A. 2d, 1941) stating that the District Court raised too high a standard on which to test the proof as to damages as found by the Commission. The Court held that where the Commission's findings "are supported by substantial evidence . . . and where no new evidence on the subject is introduced . . . it is the duty of the court to accept and give them effect". The duty of the court is equally that of the Board. The basis for plaintiff's claim was found to exist and the Court stated that the "burden to show a failure to mitigate the damages was upon the defendants".

In the reparation hearing in *Waterman* v. *Stockholms Rederiaktiebolag Svea et al.*, 3 F.M.B. 248 (1950), the Board found that the complainants had not sustained the burden of proof because of want of proof on "cost, outturn and selling price" but in so holding acknowledged that damages are to be based on the difference between cost and selling price, where there was a refusal to furnish refrigerated space to the complaining fruit shippers.

The Supreme Court has held that ordinarily "the measure of damages in such case [refusal to carry] is the difference between the value of the goods at the point of tender and their value at the proposed destination, less the cost of carriage." *New Mexico ex. rel. McLean & Co.* v. *Denver & R.G.R. Co.*, 203 U.S. 38, 27 S. Ct. 1, 3 (1906). In accord are 9 Am. Jur. Carriers, § 314, 3 Hutchinson on

Carriers (3rd Ed.) §§ 1359, 1370, 2 Moore on Carriers § 609, 13 C.J.S. Carriers, § 33, and see *Sonken-Galamba Corp.* v. *Atchinson, T. & S.F. Ry Co.*, 124 F. 2d 952, 958 (C.C.A. 8th, 1942).

In the present case proof of damages meeting the specific standards of cost, outturn and selling price was offered in detail. Witnesses were agreed on the availability of bananas in Ecuador and the existence of a market for them in the United States. Consolo was shown to have the resources to buy and ship bananas. The loading sheets showing actual purchases and the outturn sheets showing actual sales and "liquidation sheets" (report of commission merchant to importer showing proceeds of sale, expenses, commission and net proceeds) were used, for each shipment of bananas by Consolo on Grace Line ships during the reparation period. The space that would have been used on Flota ships at Flota's freight rates during the reparation period was shown. Costs in Ecuador were taken from actual loading sheets showing actual purchases week-by-week. Freight charges were supplied from Flota's records of actual freight collected on its voyages during the reparation period. Stevedoring costs came from testimony of banana shippers as to actual cost at New York. We find the figures used in the reparation computation to be fully supported in the record. The computation itself, using the above data, established a dollar figure for profit or loss per banana stem shipped before stevedoring and freight. From the amount of profit per voyage the freight stevedoring and incidental administrative overhead and other expenses have been deducted. The examiner's conclusions were based on these fully documented facts.

Consolo excepted to the examiner's recommendation that the reparation period did not begin until August 23, 1957 and to the failure to recommend that Consolo be awarded reparation for the period November 15, 1955 through September 1959 inclusive. Consolo also excepted to an error

in computing damages within the period August 23, 1957 to September 1, 1959 on the ground that the deduction from profit for stevedoring costs should be the cost for stevedoring in Philadelphia instead of New York. The New York costs were shown to be 48.8 cents per stem whereas the actual Philadephia costs were later shown to be 35.15 cents per stem.

Flota excepted to the following:

1. The Examiner's ultimate recommendation.

2. The Examiner's failure to recognize that the Board's decision of June 22, 1959 did not purport to determine liability for the period prior thereto.

3. The incompleteness of the Examiner's findings as to the facts and circumstances confronting Flota prior to and during the period for which reparations are sought, and to his failure to consider and make complete findings thereon, as contained in Flonta's opening brief on reparations, and in the present brief; and his failure to find that in light of such circumstances Flota's actions were completely reasonable and violated no provision of the Act, and no obligation to Consoio.

4. The Examiner's failure to find that in any event award of reparations would be inequitable and unjust, and for that reason should be denied.

5. The Examiner's inclusion of voyages subsequent to the Board's report of June 22, 1959, in calculating reparations, and to his failure to find that Flota acted promptly thereafter to comply with the Board's order, and therefore incurred no liability during that period.

6. The Examiner's failure to find that the burden of proof upon all issues was upon Consolo, including the alleged violation prior to compliance with the Board's order of June 22, 1959; the alleged injury to Consolo

during the period; and the extent of any such injury; and to his failure to impose that burden on Consolo.

7. The Examiner's failure to find that the record proves there was no injury to Consolo and that Consolo's claim of injury is not bona fide.

8. The Examiner's failure to find that Consolo's claimed losses are speculative.

9. The application by the Examiner of an incorrect measure of damages.

10. The Examiner's incorrect computation of reparations, including his arbitrary allocation to Consolo of one third of Flota's space, for calculation purposes; his failure to appreciate the significance of the 18.46 percent figure representing the allocation to Consolo following the Board's order of June 22, 1959.

11. The Examiner's failure to hold Consolo is not the proper party complainant.

12. The Examiner's conclusion that Consolo could not have minimized his damages, if any, by utilizing other available transportation, including specifically Grace Line, Chilean Line, and chartered vessels.

13. The recommended award of interest on reparations.

14. The Examiner's subsidiary findings, or the possible implications therefrom, inconsistent with the foregoing exceptions, listing certain findings of fact.

15. The Examiner's failure to find that the renewal of Panama Ecuador's (Panama-Ecuador Shipping Corporation, exclusive shipper on Flota's ships) contract in 1957 was based upon an option contained in the 1955 contract between Flota and Panama Ecuador, and upon Flota's action determining that Panama Ecuador's bid was the most favorable to it, all of which occurred prior to the Board's decision in the *Banana Distributors* case; (*Banana Distributors, Inc.* v. *Grace Line Inc.* 5 F.M.B. 278 (1957)).

16. The Examiner's failure to find that there was no significant competition between Consolo and Panama Ecuador.

17. The method of ascertaining damages employed by the Examiner.

18. The Examiner's failure to make subsidiary findings as to the components of the recommended $259,812.26 reparations.

19. The Examiner's failure to enter findings in accordance with the facts recited by Flota in its opening brief on reparations.

The arguments supporting the exceptions are esentially (1) that the Board did not, in *Philip R. Consolo et al.* v. *Flota Mercante Grancolombiana* (supra), find Flota guilty of violating the Act before June 22, 1959; (2) that in contracting all of its refrigerated space for bananas to a single shipper before then Flota acted legally, (3) that the failure of the Board or the Board's staff, prior to June 22, 1959, to give Flota a legal opinion, in response to a petition for declaratory relief, as to the validity of Flota's exclusive patronage contract prevents the Board from considering Flota as having acted wrongfully; (4) that the complaint and request for the losses are speculative, the claim for reparation is not bona fide, and the burden of proving loss has not been sustained; and, (5) the damages were incorrectly measured and computed and interest should not be added.

For the reasons given below, we agree in part only with the respondent's exceptions as to the computation of reparations and to the award of interest on reparations. The remaining exceptions are rejected. Exceptions and proposed findings not discussed in this report nor reflected in our finding have been considered and found not justified.

The 1st and 13th exceptions refer to the award of interest on reparations. We find that it would be inequitable to

award interest on an unliquidated claim before it was due and disallow any interest on the award herein.

In exception 2 respondent argues that it acted reasonably and did not unjustly, unfairly or unreasonably discriminate against Consolo and therefore did not violate any statute during the period before the Board's order of June 22, 1959. In exception 3 the incompleteness of the findings is averred and in exception 4 failure to find inequity in an award is excepted to. Our report in 5 F.M.B. 633 has already held that in the past "Flota has acted in violation of Secs. 14, Fourth and 16 of the Act." (639). The facts and circumstances omitted all relate to more arguments that Flota did not violate the Act before June 22, 1959. Such facts and the issues they raise have already been considered and decided in the first proceeding and are not appropriate subjects for exceptions in the reparations phase of this docket. The examiner properly did not review these facts nor retry the issues they raise. The previous report on these issues is plain and is final as far as the Board is concerned. The only remaining issue was the measure of the reparation Consolo is entitled to under Sec. 22 of the Act. Facts bearing on this issue alone were all the examiner was required to consider.

The exceptions are also based on the argument that because Flota had contracted all of its space to another single shipper during the period involved reparations would be inequitable and unjust and the inclusion of voyages before June 22, 1959, when the favored shipper's contract was still being performed, was not proper. This argument, too, uses the erroneous premise that performance of the exclusive patronage contract, during a time when Flota unjustly discriminated against a shipper in the matter of cargo space and gave undue and unreasonable preference or advantage to particular persons, was a valid excuse for non-performance of obligations under Secs. 14 and 16 of the Act. The performance of the contract is the very act

which constitutes the violation of such sections. We have held that such conduct was improper in the following words: "It is . . . clear that they (Consolo and Banana Distributors, Inc.) were denied reefer space accommodations by Flota, to their prejudice and disadvantage, and that Panama Ecuador, in receiving and using that space, was favored and advantaged. We find no justification for this conduct on the part of Flota and conclude that in denying reefer space to complainants, and in granting that space to a single favored shipper, Flota has acted in violation of Secs. 14, Fourth and 16 of the Act." *Philip R. Consolo et al.* v. *Flota Mercante Grancolombiana,* (supra at p. 638). In other words, as long as the contract caused the denial of space there was a violation. The violation did not begin June 22, 1959, but long before this. There can be no question of inequity or unjustness to a respondent who violates the Act by means of an exclusionary contract. It is the excluded shipper who has the equities on his side under the Act, not the favored shipper nor the discriminatory and preference-giving carrier.

One of the arguments advanced to prove absence of fault in failing to offer non-discriminatory and non-preferential service was (1) that Flota had filed a petition for declaratory relief (Docket No. 835, decided in *Philip R. Consolo et al.* v. *Flota Mercante Grancolombiana,* 5 F.M.B. 633 (1959)) asking the Board to determine the validity of Flota's contracts and to terminate the uncertainty that had arisen as a result of the conflicting demands upon Flota following the decision in *Banana Distributors, Inc.* v. *Grace Line Inc.,* 5 F.M.B. 278 and 5 F.M.B. 615 (1959) and, (2) that the Board failed to make a timely response thereto. It was not incumbent on the Board, however, to give Flota a legal opinion on the effect of its conduct on shippers. The demands were conflicting only to the extent that Flota made them so by continuing to serve favored shippers. The subsequent uncertainty was the consequence of Flota's own position that it could continue to contract refrigerated

space to preferred shippers and to exclude complainants without violating the Act as was contended in *Grace Line* v. *Federal Maritime Board*, 280 F. 2d 790 (C.C.A. 2d 1960). In *Philip R. Consolo* v. *Grace Line, Inc.*, 4 F.M.B. 293 (1953) and *Banana Distributors, Inc.* v. *Grace Line, Inc.*, 5 F.M.B. 278 (1957) the Board decided that Grace Line, Inc. was a common carrier by water under sufficiently similar facts as to lead the Board to state in the present case (5 F.M.B. 633) that what we said in the *Banana Distributors* case "is appropriate here, and we feel is dispositive of the issues in this proceeding". Instead of accepting the *Grace Line* cases as providing a rule for its guidance, Flota refused to offer service and litigated the issues relying on "arguments relating to the differences between Flota's vessels and Grace's vessels" (635) to justify such refusal. Flota was eventually found to have violated Secs. 14, Fourth, and 16 of the Act. No delay converted its past violations into lawful conduct and Flota must take the consequences of its refusal, (it became a common carrier in 1955) to take Consolo's cargo after Consolo asked for non-preferential service in 1957. Common carrier status is not created by nor are violations of the Act nonexistent until the Board's report is served. Both are brought about by Flota's own actions beginning in 1955.

The 5th exception relates to the inclusion in the reparations calculations, of voyages after June 22, 1959, which is the date our report in No. 827 was "decided". The examiner extended the damage period to September 1, 1959 when Consolo was actually allotted space in response to the Board's order served on July 2, 1959. Respondents were ordered, within 10 days after the date of service of the order, to offer refrigerated space for the carriage of bananas on its ships to all qualified banana shippers. Flota made no offers between June 22 and July 12, 1959, but we have no reason to doubt that Flota would have offered space on July 12 if bananas had been tendered in Guayaquil at that time. None were tendered before then, as far as

this record shows. No shipments were ready until September, but this does not furnish a reason for extending the damage period beyond the date when the Board's order should have been complied with, in the absence of any offer of proof by complainant of a refusal, after July 12, 1959, and in the absence of proof of its own willingness to ship, nor of a tender of cargo. The damage should not be extended to the time when the complainant shipper was ready to provide a cargo, but is limited to voyages departing from Guayaquil through July 12, 1959, the date when compliance should have begun. (Cf. *Swift & Company and Swift and Company Packers* v. *Gulf and South Atlantic Havana SS Conference et al.*, Docket No. 854 Decided February 2, 1961.

The 6th, 7th and 8th exceptions all concern the proofs of injury offered by complainant and allege a failure to maintain the burden of proof or to show actual damage. The burden of proof was maintained by extensive testimony and exhibits showing availability of bananas, cost, selling price (226 quotations over a period of four years were shown) and freight stevedoring and other expenses as noted above. The actual damages were shown to be proximate result of violations of the statute. *Waterman* v. *Stockholms Rederiaktiebolag Svea et al.*, 3 F.M.B. 248, 249 (1950). The losses shown were not speculative, but fairly inferrable from the data supplied and testimony of witnesses that complainant would have shipped on Flota ships if he had not been excluded.

The 9th, 10th and 17th exceptions deal with the method of measuring and computing the damages. The examiner began the measure of damages from August 23, 1957 instead of 1955 as claimed. We agree that the examiner's date and with the finding that Consolo's offers and counteroffers for service before then were for contract carriage and not for space on a non-preferential basis. He was not excluded before then because he never sought an allocation

of space on an equal basis with other shippers; rather, Flota's facilities or charges for services were not acceptable to the complainant on complainant's terms. These negotiations may not be translated into requests for a non-preferential allocation of space on a common carrier by water. What Flota refused during this period was the demand for a special contract which would make Consolo a favored shipper too.

The examiner found Consolo entitled to one-third of Flota's space based on the fact that complainant was one of three qualified applicants for space. Other applicants were declared to be unqualified. When space was finally allocated five shippers actually qualified and measured by Flota's technical adviser showed that in actual practice over a period of time there had been an allotment to, and use by, Consolo of 18.46% of the cubic capacity of Flota's ships on the U.S. Atlantic run. This actual experience with Flota appears to be a just and reasonable guide of what Consolo was entitled to for the purpose of measuring his past damages and it is adopted. Respondent's exception on this point is valid.

The 11th exception is found unsupported.

The 12th exception deals with complainant's failure to minimize damages by using other means of transportation. Once the failure to perform common carrier obligations and exclusion is shown, "the burden to show a failure to mitigate the damages was upon the defendants". *Hernandez* v. *Bernstein*, 116 F. 2d 849 (C.C.A. 2d 1941) at pp. 851, 852. Flota offered no such proof other than a suggestion that chartered ships might be used, but no suitable ones were shown to be available. Respondents have failed to show any mitigating factors.

Exception 14 relates to the examiner's subsidiary findings of fact on which the award of reparations is based. None is shown to be wrong, all have been fully established in this docket.

The 15th exception likewise assumes the untenable premise that discriminatory and preferential conduct did not exist until after the Board's decision on Consolo's complaint against Flota and that the contract which caused such conduct excused the disregard of statutory obligations.

The 16th exception is unsupported by the record.

The 18th and 19th exceptions relate to the ascertainment of damages. Complainant submitted extensive evidence of lost profits in the form of schedules of about 226 individual voyages between 1955 and 1959 showing for each voyage the number of banana stems actually carried by named ships on specified dates between Guayaquil, Ecuador and Philadelphia, Penna. (with the exception of two ships which discharged at Charleston, S.C. and Baltimore, Md. respectively because of a strike at Philadelphia, Penna.) In the absence of other proven data and of any disproof of the complaint's data or challenge of complaint's figures, such data and figures have been used in the computation of reparations found to be due.

The complaint's profit per stem of bananas is the difference in cost at Guayaquil and the value or sale price at Philadelphia which is taken to be the total gross profit per stem. This amount has been multiplied by the number of stems on each shipment and the products added to get the gross profit. From such total gross profit there has been deducted (1) the total freight cost and (2) the total estimated cost of handling the bananas at Philadelphia. The latter amount is 50.15 cents a stem (35.15¢ for stevedoring, plus 3¢ for overhead, plus 12¢ for insecticides, rope and bags) multiplied by 1,061,286 stems carried during the reparation period. Complainant did not show the 3¢ a stem deduction for overhead in its claim, but this amount was deducted by the examiner with the subsequent admission by the complainant that it was a proper amount. The examiner's computation was also based upon the use of New York instead of Philadelphia stevedoring costs and

omitted the deduction of the estimated incidental costs of handling bananas at Philadelphia in the amount of 12 cents. That latter figure was also furnished by complainant.

Based upon the shipment of 1,061,286 stems of bananas on 98 voyages between August 23, 1957 and July 12, 1959, the use of complainant's statement of profits per voyage totaling $2,514,236.43 on all voyages allowed, and the subtraction therefrom of total freight in the amount of $1,204,343.95 and incidental costs in the amount of $532,234.93, as proven by complainant, we find the remainder is the proper net profit of $776,657.55. Consolo is entitled to 18.46% of the net profit. An award is hereby made and shall be paid to complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, in the amount of $143,370.98, with interest at the rate of 6% per annum on any amounts unpaid after 60 days, as reparation for the injury caused by respondent's violation of Secs. 14 and 16 of the Shipping Act, 1916, as amended.

By the Board.

THOMAS LISI
Thomas Lisi
Secretary

Order

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 28th day of March, 1961.

No. 868

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

This proceeding being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, on the date hereof, having made and entered a report stating its findings of fact, conclusions and decisions thereon, which report is hereby referred to and made a part hereof;

It is Ordered, That respondent Flota Mercante Grancolombiana, S.A. be, and it is hereby notified and directed to pay unto complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, $143,370.98, with interest at the rate of 6% per annum on any amounts unpaid after 60 days, as reparation for the injury caused by respondent's violation of Secs. 14 and 16 of the Shipping Act, 1916, as amended.

By the Board.

THOMAS LISI
Thomas Lisi
Secretary

APPENDIX E

FEDERAL MARITIME COMMISSION

No. 827 (Sub. No. 1)

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

On rehearing on remand complainant found injured to the extent of $106,001.00 by respondent's refusal to allocate, between August 23, 1957 and July 12, 1959, refrigerated space on respondent's ships for the carriage of bananas and reparation in such amount awarded.

Robert N. Kharasch, William H. Lippman and *Amy Scupi* for complainant. *Odell Kominers* and *J. Alton Boyer* for respondent.

Report

BY THE COMMISSION (John Harllee, Chairman, Ashton C. Barrett, James V. Day, John S. Patterson, Thos. E. Stakem, Commissioners):

Pursuant to remand by the United States Court of Appeals for the District of Columbia Circuit,[1] this matter was reheard for the purpose of reconsidering the order of our predecessor, the Federal Maritime Board, directing respondent, Flota Mercante Grandcolombiana, S.A. (Flota), to pay reparations to complainant, Philip R. Consolo (Consolo).

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[1] *Flota Mercante Grancolombiana, S.A., et al.* v. *F.M.B.* and *U.S.A.*, 302 F. 2d 887, 112 U.S. App. D.C. 302 (1962).

On June 22, 1959, the Board in Dockets 827, 835 and 841[2] found that Flota had violated sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916, by excluding Consolo and another qualified banana shipper (Banana Distributors) from participation in the refrigerated space on its common carrier vessels in the trade between Ecuador and the United States and allocating all such space to a single shipper, Panama Ecuador. On March 30, 1961, the Board in Docket 827 (Sub. No. 1) entered on behalf of Consolo the reparation order here under reconsideration, in the amount of $143,370.98. No interest was allowed in this award but interest at 6 percent per annum was granted on any amount not paid by Flota 60 days after the Board's order. This supplanted an Examiner's decision which had awarded Consolo $259,812.26 as reparations.

On appeal, the Court had before it two petitions by Flota, one attacking the Board's finding that it had violated the Shipping Act, the other attacking the reparation order, as well as a petition by Consolo attacking the reparation order. The Court sustained the Board's finding of violations and upheld its denial of Consolo's claims for pre-award interest, for an earlier starting date for the reparation period, and for an upward revision in the amount of space he would have been allocated if permitted to ship on Flota's vessels. However, the Court set aside the Board's reparation order and remanded it to the Commission to consider—

> * * * whether, under all the circumstances, it is inequitable to force Flota to pay reparations, or at least inequitable to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board.

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[2] *Philip R. Consolo* and *Banana Distributors, Inc* v. *Flota Mercante Grancolombiana, S.A.*, 5 F.M.B. 633 (1959).

The Court prefaced this language with a discussion of Flota's argument that it would be "inequitable" to award reparations because of the following factors:

1. The then "unsettled nature of the law" as to whether a violation had occurred.

2. The possibility that Flota "in good faith believed" its situation was distinguishable from that of Grace Line, the carrier in a recent case dealing with similar issues, due to factual differences, *i.e.*, the physical characteristics of Flota's vessels and difficulties and delays in loading if more than one shipper were to use its banana space.

3. The Board's delay in deciding a petition for declaratory order sought by Flota (Docket 835).

4. Flota's "possible liability" for breach of the exclusive contract which it had signed with Panama Ecuador, one of Consolo's competitors, for what Flota may have thought "a reasonable period of time" in light of the Board's decision in a prior banana case involving Grace Line.

5. Consolo's apparent failure to utilize all of the banana space already available to him on Grace Line vessels.

The Court stated that the Board "took up most of these points individually and disposed of them briefly", and went on to say—

> But the essence of Flota's argument was that the cumulative weight of all of the circumstances, and not any one circumstance, rendered it inequitable to require reparations. We are not prepared, on appeal, to go this far; but we do consider * * * that the Board failed to give adequate consideration to this issue. The Board may have erroneously believed (1) that it was required to grant reparations once it found a violation of the Act, (2) that all of the issues as to the reasonableness

or equity of Flota's conduct were determined in the first phase of the proceeding.

Discussion and Conclusions

The Commission recognizes, and we think the Board did, that section 22 of the Shipping Act does not require the award of reparations when a violation has been found. The language of the section is that we "may" direct the payment of "full reparation" for injury caused by the violation. This is permissive, hence the mere fact that a violation of the Act has occurred does not in itself compel a grant of reparations. We believe, also, that in granting reparations the Board took account of all the circumstances. But in any case we have made our own thorough review of this matter and have concluded that Consolo is entitled to reparations, though in an amount smaller than the Board awarded. In so concluding, we have not only reexamined the record but have considered the contentions of the parties including the arguments set forth in their briefs submitted on remand, and have particularly weighed the individual and cumulative effect of the factors mentioned by the Court as they bear on the equities.

First, we discuss the "unsettled nature of the law" in May 1957, at the time Flota executed a renewal contract allocating all of its available banana space to Panama Ecuador for three years, thereby excluding Consolo (and others) from its vessels. Shortly prior to this, in April 1957, the Board in *Banana Distributors, Inc.* v. *Grace Line,* 5 F.M.B. 278, had held that Grace Line's practice of contracting all of its banana space to three shippers to the exclusion of other qualified shippers was unjustly discriminatory and unduly and unreasonably prejudicial in violation of sections 14 (Fourth) and 16 (First) of the Act. And four years earlier, in *Philip R. Consolo* v. *Grace Line, Inc.,* 4 F.M.B. 293 (1953), the Board had held the same thing after a full review of the problems attendant upon the transportation of bananas and of Grace's contention that

it was not subject to common carrier obligations with respect to this commodity.

Grace "satisfied" the complaint in the 1953 case but after the 1957 decision it appealed. The Board's order was reversed and remanded in 1959 by the Second Circuit Court of Appeals due to the Court's disagreement with a test—namely, that bananas "are susceptible to common carriage"—which the Board had advanced in dealing with Grace's argument that Grace was, and because of the special conditions involved in banana transportation, could only be a contract carrier of the fruit. The Court refused at that time to consider the Board's contention that a common carrier for the public generally cannot also carry "a particular commodity on a contract basis".[3] On reconsideration pursuant to this remand, the Board eliminated any reference to the "susceptibility test" and reached the same result it had reached earlier. The Board held that Grace was a common carrier by water under the Shipping Act and could not evade the requirements of the Act as to any part of the goods it carried. On appeal the Second Circuit in 1960 affirmed this decision and the Supreme Court refused review.[4]

We must judge Flota's protestations of innocent intent in the context of the circumstances as they existed in May 1957 when it executed the three-year renewal of its exclusive contract with Panama Ecuador and it is evident from the foregoing that Flota executed that contract in contravention of two Board decisions directly in point. In both instances the Board had held that Grace was a common carrier of bananas and had declared illegal its attempts to exclude qualified banana shippers from its vessels. The

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[3] *Grace Line, Inc.* v. *Federal Maritime Board,* 263 F. 2d 709 (CA2, 1959).

[4] *Banana Distributors, Inc.* v. *Grace Line,* 5 F.M.B. 615 (1959), aff'd *Grace Line, Inc.* v. *Federal Maritime Board,* 280 F. 2d 790 (CA2, 1960), cert. denied 364 U.S. 933 (1961).

Board had ruled, also, that forward booking arrangements for transportation of the fruit for a period not exceeding two years were reasonable provided the available space was prorated among all qualified banana shippers who desired it.[5] Of course, the courts could alter these decisions, and to that extent they did not "settle" the law. But they were authoritative pronouncements by the agency with prime responsibility in the field and we fail to see why shippers should be penalized because Flota chose to ignore them and sign a three-year exclusive contract. Moreover, while Grace appealed the Board's 1957 order, the order was not stayed and remained valid pending the outcome of the appeal which neither Flota nor anyone else knew would succeed—as it temporarily did in 1959.

Flota argues that if it accepted Consolo's demands for space it might have been faced with litigation for breaching its contract with Panama Ecuador. But a provision in that contract absolved Flota of any liability in the event the contract was declared illegal or unenforceable. Although this provision might have put Flota in the position of having to defend the *Grace* decisions and assert their application to the Panama Ecuador contract, it is not unreasonable to think that one acting in good faith would choose such

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[5] Bananas are plentiful in Ecuador, and the amount of bananas a shipper can sell depends solely on the current market for the product and the amount of space he can acquire for transportating them. The fruit is, however, highly perishable and must be carried in refrigerated compartments to prevent rapid ripening. Through forward booking arrangements the shipper is able to contract for a fixed amount of carrier space for a specific period of time. Such an arrangement permits the shipper to purchase bananas with the knowledge that vessel space is available for carrying them. During the period of the forward booking contract, other shippers, not party to this arrangement, are foreclosed from any space. In the 1957 *Grace* case forward booking arrangements for a two-year period were approved but only if a reasonable proration of space was made to all qualified shippers who desired it and were prepared to meet the terms of the forward booking contract.

a course. Flota consciously chose the opposite course and we can only conclude that it did so because it preferred the advantages of its long-term, exclusive arrangement with Panama Ecuador.

In so acting, Flota violated its common carrier duty, as repeatedly declared by the Board, to carry goods for all qualified shippers. Even if Flota thought the Board would be reversed, one who acts in contravention of a statute, court or administrative ruling, in the belief that it will be declared invalid, assumes a calculated risk. If the law which he contravenes is upheld, he must face the consequences. Flota is not facing but is seeking to escape the consequences by passing the burden of its wrongdoing on to the party who bore the pecuniary brunt thereof. This does not appeal to our sense of equity.

We next deal with the possibility that Flota "in good faith believed" its situation was distinguishable from that of Grace. Flota argues that its ships were not adaptable for loading and unloading and points out that when in 1959 it did open its space to several shippers, they combined into a single corporation, the Continental Banana Company, to act as a single shipper in the stevedoring, importation and marketing of bananas. But this goes to refute Flota's argument rather than support it because it shows that means were available to solve the problem of accommodating several shippers. Instead of a good faith exploration of such means, Flota, we think, simply preferred its existing one-shipper arrangement.

It would be safe to assume that every vessel in the banana trade is not exactly the same, structurally. To rely upon their structural differences as an excuse to avoid common carrier obligations would go far toward eliminating such obligations. Thus, legal precepts based on activities of a similar carrier, a similar contract, the same commodities, and the same trade, could be overridden by claiming structural differences in the ship. Nor is a refusal to carry

goods for many justified by fear that they cannot cooperate in using the available space. Whether shippers can cooperate will never be known unless they are offered space. It is the common carrier's duty to offer the space and give shippers the chance to devise cooperative means of using it. In the final analysis the possibility of cooperation is one to be assessed by the individual shippers, and not the carrier. If multiple utilization is truly impossible, we think shippers will recognize this and accept the fact that the space can only be utilized on an exclusive basis.

Regarding the question of the Board's delay in deciding Flota's petition for declaratory order, we first point out that Flota brought this petition only under threat of a formal complaint by Consolo, which complaint Consolo actually filed two weeks after the petition. Flota had already violated the Act as interpreted by the Board when it filed its petition, hence it did not, in fact, seek the Board's assistance in governing its conduct. Its resort to the Board was under pressure of the troubles it had invited by executing a three-year renewal of its exclusive contract with Panama Ecuador, in complete disregard of everything the Board had said on the subject. Again, judging Flota's claim in proper context, we are unconvinced of its good faith.

More importantly, however, Consolo's complaint, unless satisfied, was required to be investigated and determined by the Board under section 22 of the Shipping Act, 1916, regardless of the disposition it made of Flota's petition. And in the exercise of its discretion under section 5(d) of the Administrative Procedure Act (A.P.A.), the declaratory order provision (5 U.S.C. 1004(d)), the Board not only did not have to accord Flota's petition priority of consideration, it did not have to consider the petition at all. It might well have adjudicated the matter on the basis of Consolo's complaint and the one later filed by Banana Distributors, as being the more appropriate and effective procedure for

handling the issues involved. Thus, the Attorney General's Manual on the A.P.A. states at p. 60 that an agency need not issue declaratory orders—

> * * * where it appears the questions involved will be determined in a pending administrative or judicial proceeding, or where there is available some other statutory proceeding which will be more appropriate or effective under the circumstances.

See also *Western Air Lines* v. *C.A.B.*, 184 F. 2d 545 (CA-9, 1950) with respect to the wide discretion an agency has in choosing the means to dispose of the business before it.

Even standing alone, Flota's petition would have offered no promise of a speedy resolution of the controversy. Under section 5 of the A.P.A., such a petition must be determined on the record after notice and opportunity for agency hearing.[6] In filing the petition Flota conceded nothing. It took the position that its vessels were different structurally from Grace's vessels and as a practical matter they could only accommodate a single banana shipper.[7] Flota's assertion of this position, which was sharply disputed by the aggrieved shippers, led to a complex and lengthy hearing into the physical characteristics and utilization of its vessels so far as the banana trade was concerned. Flota made the contention notwithstanding the in-depth probing of the special conditions of banana carriage including multiple shipper problems, which had occurred in the *Grace* cases. It hoped somehow to avoid those cases. Flota had a right to attempt this but any possibility of a prompt

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[6] 5 U.S.C. 1004; see also Attorney General's Manual on the A.P.A., p. 59 and Rule 10(i), FMC Rules of Practice and Procedure.

[7] Flota also contended during the course of the proceeding that it was not a common carrier of bananas, that even if it was it had not prejudiced or unjustly discriminated against shippers, and that it had not violated the Act.

disposition of the controversy was thereby precluded, no matter what form the adjudication took.

Clearly, there is no substance to Flota's argument that its petition should have been determined independently of the complaints filed by Consolo and Banana Distributors, or that this would have expedited resolution of the dispute. Flota suffered no prejudice through the consolidation of its petition with complaints involving the identical controversy. We think the Board was entirely reasonable in exercising its discretion in this respect.

Nor is there any support for the suggestion that there was Board delay in the actual handling of the controversy, for which Flota is being made to pay reparations. The consolidated proceeding took about two years to terminate, and Flota meanwhile continued its advantageous Panama Ecuador arrangement. Panama Ecuador itself participated in the case, arguing along with Flota that the physical limitations of the vessels foreclosed their use by more than one banana shipper.

The record of the proceeding reflects that numerous requests for postponements were made and that Flota either authored or favored most of these. If there was any disposition on its part for a prompt determination, this cannot be discerned. For example, Flota asked for and obtained delays in answering Consolo's complaint and in the time set for the first prehearing conference; it joined in putting the hearing off to a date four months after that prehearing; and it then moved for a further delay of over two months in the hearing date. The hearing thus did not begin until a year after the filing of Flota's petition and Consolo's complaint. Whatever else may be said in justification of these delays, they cannot be explained on the ground that Flota was seeking "prior action" on its petition. The delays were in no sense caused by the Board. Indeed, in rendering their decisions the Examiner and the

Board acted with what may be termed unusual dispatch, considering the controversial nature and size of the record.[8]

Turning now to Flota's allegation that under the Board's decision in the *Grace* case it believed its forward booking contract with Panama Ecuador was for a reasonable period of time, we find it impossible to understand how Flota could have held any such belief. The 1957 *Grace* decision authorized forward booking for not to exceed two years, whereupon Flota executed a renewal of the Panama Ecuador contract for three years. That decision also set forth the criteria for valid forward booking contracts, making it quite clear that such an arrangement must provide "a reasonable opportunity for prospective shippers to engage in the trade" and the available space must be fairly prorated among qualified shippers. The duration of the contract is not even relevant until this latter requirement has been satisfied. Flota made no attempt to prorate its available space among qualified shippers. Instead, the space was offered and contracted to one shipper on an exclusive basis and this was illegal, apart from the period of time which the contract covered.

The final point to which we were directed to give further consideration involves Flota's contention that Consolo's failure to use all of his available space on Grace Line ships should reduce the reparations assessed in his favor. In arriving at its reparations figure, however, the Board did take account of this factor, and its award reflects this consideration.

There are certain periods during the year when the market for bananas drops, importers reduce their purchases and shippers naturally reduce their shipments to reflect the declining market. This is an industry-wide condition,

[8] The Examiner's decision was rendered three weeks after he received the parties' briefs; the Board's six weeks after it heard the oral argument.

so that at the same time Consolo was not fully utilizing his space on Grace Line, Panama Ecuador was not filling Flota's vessels nor were other shippers in the trade making full use of their available space.

The Board's reparation award was computed as follows: For each voyage made by Flota during the reparation period (Panama Ecuador, of course, being the only banana shipper), there was figured, for the actual number of bananas carried, the price received by Panama Ecuador upon the sale of the bananas less its cost of purchasing them. From this figure was deducted shipping and handling expenses such as freight and stevedoring, to arrive at the net profit or loss for the bananas shipped on each voyage.

Not every voyage was profitable and during the slack periods referred to above, particular voyages resulted in a negative or loss figure. The Board took account of the losses by making appropriate deductions from the profits, thereby compensating for the periods when Consolo could not have used all of the space on Flota's vessels to which he was entitled. The relevant exhibits reflect the industry-wide lag in the market for bananas and show a very close correlation between the periods when Consolo was not using all of his space on Grace vessels and the periods when Panama Ecuador's shipments on Flota occasioned a loss.

The Board found (and the Court sustained its finding) that an equitable proration of space to Consolo during the reparation period would have been 18.46% of the total. Thus, to determine Consolo's reparations because of being denied its just proration of space, 18.46% of the net profit (adjusted for losses as above described), was taken and the resulting figure was awarded by the Board as reparations.

In mitigation of the Board's award Flota also urges upon us Consolo's failure to charter vessels and his failure to

use space available on the Chilean Line. These points are not tenable. We agree with Consolo that it would have been a hardship for him to charter ships in order to ply his trade, and we think it unreasonable to contend he should have done so in the circumstances. Flota does not make clear what ships were available for charter; or that Consolo could have used then; and if he could, on what terms. As to the Chilean Line, it has been shown, to our satisfaction, that Consolo did exert efforts to ship thereon and did, in fact, make several such shipments late in 1958. This arrangement was terminated by the Chilean Line, however, and not by Consolo.

There are other factors and charges which were taken into account in determining the Board's award which we have reexamined and we agree that certain adjustments should be made as urged by Flota. In light of the evidence presented, the freight rate of $34 per ton of bananas charged by Flota to Consolo in 1959, when Consolo was one of several shippers via Flota, appears to be a fairer figure for computing the reparations than the rate of $30.23 per ton Flota had charged its exclusive shipper (Panama Ecuador) for all of the banana space during the reparation period. The Board used the $30.23 rate in its computation.[9] We think Flota would not have continued this rate when faced with the situation of accommodating multiple shippers because operational costs increase when more than one shipper uses the available space. It seems to us the rate of $34 per ton actually charged by Flota allocating space to several shippers, is more representative of the figure it would have charged had it allocated space to more than

[9] In determining its reparation figure, the Board computed freight on the basis of 1.134 cents per stem of bananas, which was the rate charged by Flota to Panama Ecuador, its exclusive shipper, during the reparation period. Bananas average 75 pounds per stem, hence the freight rate per ton used by the Board was $30.23. Our use of the $34 per ton rate increases the amount attributable to freight charges and reduces the reparation figure.

one shipper during the reparation period. It may be noted, also, that during the reparation period Consolo was one of several banana shippers using Grace's vessels and Grace charged him $36 per ton.

Finally, while we agree with the Board that the stevedoring costs at Philadelphia rather than New York were proper, since Flota served Philadelphia and not New York, the Board inadvertently erred in not figuring an increase in stevedoring costs instituted September 25, 1958 in Philadelphia. This amounted to 9.95 cents per stem and is taken into account, along with the revised freight rate abovementioned, in our computation of reparations.

Based upon the shipment of 1,061,286 stems of bananas on 98 voyages between August 23, 1957 and July 12, 1959 yeilding a total gross profit of $12,513,236.43 (after adjustment for negative or loss figures on some voyages), and the subtraction therefrom of total freight amounting to $1,353.139.65 and stevedoring and incidental expense amounting to $585,876.87,[10] the net profit for the 98 voyages is $574,219.91, of which Consolo is entitled to 18.46% or $106,001.00.

In our opinion this consitutes the legally and mathematically correct measure of damages in this case. We agree with the Board, as apparently did the Court, that no single "equitable" argument belatedly raised by Flota justifies departing therefrom. Flota, however, has stressed the cumulative weight of its arguments as the basis for equitable relief. Flota initiated and pursued the unlawful act without good cause and without a satisfactory showing of good faith, and we have been unable, except as noted, to

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[10] This figure is obtained by adding the amount of $53,641.94 for the increase in stevedoring costs at Philadelphia between September 25, 1958 and July 12, 1959, to the $532,234.93 which the Board determined for stevedoring and incidental expense (539,115 stems times 9.95 cents equals $53,641.94).

find any equity in its contentions whether viewed separately or together. But even if that were not so the question would arise as to how we could equitably recognize the cumulative circumstances urged by Flota.

Could we define the equities in dollars and cents? Could we say that equity dictates that a legally and mathematically correct reparation figure be reduced by some unknown and arbitrary percentage such as a third, half, or perhaps all? We think not. It is, in any event, clear to us that by this stage of this prolonged controversy Flota's position has received all possible recognition, as evidenced by the fact that the reparation figure has been successively reduced so that it is now substantially less than half the amount the Examiner awarded Consolo several years ago.

An award is hereby made and shall be paid to complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, in the amount of $106,001.00, with interest at the rate of 6% per annum on any amount unpaid after 60 days, as reparation for the injury caused by respondent's violation of sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916.

By the Commission September 16, 1963.

THOMAS LISI
Thomas Lisi
Secretary

FEDERAL MARITIME COMMISSION

No. 827 (Sub. No. 1)

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

Order Directing Payment of Reparations

This proceeding having been remanded by the United States Court of Appeals for the District of Columbia Circuit (*Flota Mercante Grancolombiana, S.A., et al.* v. *F.M.C.* and *U.S.A.*, 302 F. 2d 887, 112 U.S. App. D.C. 302 (1962)), and the Commission having considered the Court's opinion and duly reexamined the entire record and the briefs of the parties submitted on remand, and having on the date hereof made and entered a Report setting forth its findings and conclusions on remand, which Report is hereby referred to and made a part hereof:

IT IS ORDERED, That respondent Flota Mercante Grancolombiana, S.A., be and it is hereby directed to pay to complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, $106,001.00, with interest at the rate of 6% per annum on any amount unpaid after 60 days, as reparation for the injury caused by respondent's violation of sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916.

By the Commission, September 16, 1963.

(SEAL)

THOMAS LISI
Thomas Lisi
Secretary

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1964.

No. 18,230

FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Petitioner,*

v.

FEDERAL MARITIME COMMISSION, and UNITED STATES OF AMERICA, *Respondents,*

PHILIP R. CONSOLO, *Intervenor.*

No. 18,235

PHILIP R. CONSOLO, *Petitioner,*

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, *Respondents,*

FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Intervenor.*

[Filed Dec. 17, 1964]

On petitions for Review of an Order of the Federal Maritime Commission.

Before: Bazelon, Chief Judge, and Wilbur K. Miller, Senior Circuit Judge, and Washington, Circuit Judge.

Judgment

These cases came on to be heard on the record from the Federal Maritime Commission, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the decision of the Federal Maritime Commission on review herein is reversed, and these cases are remanded to the Commission with directions to vacate its reparation order issued thereunder.

Per Circuit Judge Washington.

Dated: Dec. 17, 1964